PROPERTY—EASEMENTS—CONTINUOUS AND APPARENT—The question of what constitutes a continuous and apparent easement is one that has vexed the courts for a number of years. The confusion has arisen not so much in finding a definition—though even in this respect the courts are far from unanimous—as in properly classifying those uses or *quasi* easements, which, on a severance of an estate, pass to the grantee or devisee, by way of implication and become actual easements. This difficulty is well illustrated in a recent case [1] in England. The owner of two adjoining villas, Bracton and Malta, in 1893, laid a pipe across the latter to supply the former with water for drinking and garden purposes. The source of the water was a well on the land of a third person. In 1894, drinking water was obtained for Bracton Villa from a water company; but the pipe line was used for the garden, and had been so used up to the time of this suit. The owner died in 1902, and the devisee of Bracton leased to the plaintiff; while the devisee of Malta sold it to the defendant, Cotton. Although there was a tank on the grounds of Bracton, into which the water flowed, yet the new owner of Malta seems to have been ignorant of the fact that the pipe ran through his premises; and the well had been overgrown with weeds for a number of years. In 1914, while laying out a new carriage road, workmen discovered the pipe and on the orders of the defendant, cut it. The plaintiff thereupon brought this suit, asking that the pipe be restored and that the defendant be enjoined perpetually from interfering with it, on the ground that it constituted an easement which passed to the devisee, under the words, "of Bracton and its appurtenances."

After a very thorough discussion of what easements pass by implication, the court decided that this was of the class known as "continuous and apparent," and that the plaintiff was right in his contentions. That the court was correct as far as the continuousness is concerned, there is little doubt. "The test of continuousness is, that there is an alteration or arrangement of a tenement, which makes one part of it dependent in some measure upon another. This alteration or arrangement must be intended to be permanent in its nature." [2]

There also enters into the definitions the idea that it may be enjoyed without the further necessity of human interference, once it has been established,[3] but there is a limitation on the doctrine that has caused many diverse opinions—namely, the degree or necessity. The general rule, as far as one exists, seems to make "reasonable" necessity, or even convenience, the criterion; [4] and this in cases of

[1] Schwann v. Cotton & Hayles, 114 Law Times 780 (1916).

[2] Jones, Easements, Sec. 143.

[3] Fetters v. Sumphreys, 18 N. J. Eq. 260 (1867), at p. 262; Washburn, Easements, 2d Ed., p. *13.

[4] Nicholas v. Chamberlain, Croc. Jac. 121 (1607); Watts v. Kelson, L. R. 6 Ch. App. 166 (1871); Tiffany, Real Property, Sec. 317.

continuous and apparent easements. Combining these ideas, it might be said that a continuous easement, reasonably necessary, will pass by implication. It should be noted, however, that at least two jurisdictions, Massachusetts and Maine, hold that there must be a *strict* necessity, regardless of whether the easement is continuous or not.[5]

What easements, then, are considered "continuous"? A complete enumeration would be impossible with any hope of universal approval, but there are some about which there is little, if any doubt: ". . . the best of a running stream, an overhanging roof, a pipe for conveying water, a drain, or a sewer." [6] It will be noted that rights of way are omitted; this is generally true, they being classed as "non-continuous," and a distinction being made between the two classes.[7] There seems to be a tendency, however, to regard this distinction with some disfavor, and to put the implied creation on another ground than mere continuousness. This is evidenced in a number of cases,[8] although more or less in the way of *dictum*. If the doctrine indeed rests on the supposed intention of the grantor,[9] this distinction should be abandoned. Speaking of the doctrine of easements by implication in *Dalton* v. *Angus*,[10] Lord Blackburn said:

"Those who framed the Code Napoleon had to make one law for all France. To facilitate this task, they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts., 688, 689).[11] Those divisions and the definitions were, as far

[5] Buss v. Dyer, 125 Mass. 287 (1878); Stevens v. Orr, 69 Me. 323 (1879); Washburn, Easements, pp. 108 and 109.

[6] Fetters v. Humphreys, *supra*.

[7] Polden v. Bastard, L. R. 1 Q. B. 156 (1865); Boone, Real Property, Vol. II, Sec. 306; Washburn, Easements, p. 105, *et seq*.

[8] Ewart v. Cochrane, 5 Law Times 1 (1861); Bayley v. Great Western Ry., L. R. 26 Ch. Div. 434 (1884), at p. 452; Martin v. Murphy, 221 Ill. 632 (1906).

[9] Morrison v. Marquardt, 24 Ia. 35 (1867).

[10] L. R. 6 App. Cas. 740 (1881), at p. 821.

[11] Code Napoléon, Art. 688: "Les servitudes ou sont continues, ou discontinues. Les servitudes continues sont celles dont l'usage est ou peut être continuel sans avoir besoin du fait actuel de l'homme: tels sont les conduites d'eau, les égouts, les vues et autres de cette espèce. Les servitudes discontinues sont celles qui ont besoin de fait actuel de l'homme pour être exercées: tels sont les droits de passage, puisage, pacage et autres semblables." Art. 689: "Les servitudes sont apparentes, ou non apparentes. Les servitudes apparentes sont celles qui s'annoncent par des ouvrages extérieurs, tels qu'une porte, une fenêtre, un aqueduc. Les servitudes non apparentes sont celles qui n'ont pas de signe extérieurs de leur existence, comme, par exemple, la prohibition de bâtir sur un fonds, ou de ne bâtir qu'à une hauteur déterminée." While it does not affect the seeming disapproval of these distinctions to be found in Lord Blackburn's opinion, yet it must be noted that they *do* occur prior to the Code Napoléon. Merlin, Répertoire

as I can observe, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it is certainly not to be found in any English law authority before Gale on Easements in 1839."

While not actually denying the distinction, it would seem that Lord Blackburn disapproved of it. In a comparatively recent American case,[12] the court notes that the distinction is borrowed from the civil law and criticizes it rather severely. It is interesting to note that in Pennsylvania the earlier cases make no distinction on these grounds between rights of way and other easements more strictly continuous.[13] Their decisions are based on the assumption that a right of way may be perfectly open and permanent; and the doctrine is summarized by Justice Thompson as follows:

"It is not to be understood by this doctrine, that any temporary convenience, adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious, or plainly visible, and from the character of which it may be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purposes of mere pleasure." [14]

This view has been somewhat modified by a later case,[15] which classes a right of way as a non-continuous easement, but admits that it may pass by implication—aside from a way of necessity—under proper circumstances, though deprecating the further extension of the doctrine of the earlier cases.

universel et raisonné de Jurisprudence, 5th Ed., Vol. XXXI, p. 46, also notes the distinctions between "servitudes visibles" and "servitudes cachées," "servitudes continues" and "servitudes discontinues"; and again on pp. 50 and 51, he enters into a more minute description of these servitudes and their characteristics. In Brodeau's Commentary on La Coutume de Paris, Vol. II, top of p. 498, there is mention of the various easements: "Mais cette distinctions est inutile, par ce que la Coutume, soit l'ancienne ou novuelle, requiert titre, sans lequel elle rejete indifferemment la prescription en toute sorte de Servitudes, urbanes et rurales, *continues et perpetuelles, ou discontinues et interrompues, soit visibles et apparentes, ou occultes et latentes. . . .*" And in Vol. II of de Ferriere's commentary on the same body of law, p. 1541, reference is made to La Coutume d'Anjou, Art. 454, where the distinction is mentioned. In addition, Denisart, Collection de Décisions nouvelles et de Notions Relatives à la Jurisprudence actuelle, Vol. IV, p. 393, reports a case in 1756, which refers to a "servitude apparente." From these sources it would appear that the framers of the Code Napoléon did not invent the distinctions, as intimated by Lord Blackburn, but based the two articles in question, upon certain of the customary laws and upon distinctions originated by the courts.

[12] Baker v. Rice, 56 Ohio St. 463 (1897), at p. 477.

[13] Phillips v. Phillips, 48 Pa. 178 (1864); Overdeer v. Updegraff, 69 *id.* 110 (1871).

[14] Phillips v. Phillips, *supra*, at p. 185.

[15] Francies's Appeal, 96 Pa. 200 (1880); Washburn, Easements, p. 110.

There remains to be considered the question of "apparent" as raised in the principal case. There are not a few decisions which go so far as to say that to be "apparent" the easement must be perfectly obvious and visible; and some of them directly classify drains as "non-apparent."[16] When the nature of such easements is considered, however, it would appear that the cases which put a less strict interpretation on "apparent," are more logical.[17] These cases probably represent the great weight of authority[18] and moreover appeal to one's sense of justice. The court in the principal case seems to have been greatly influenced by the language in *Pyer* v. *Carter*,[19] and *Wheeldon* v. *Burrows*.[20] Justice Astbury says at the conclusion of the opinion: "If, in a case like the present . . . it is necessary in implying a grant of an easement for it to be 'apparent' as well as continuous, the expression in my judgment means or includes easements 'apparent' on the premises granted." This is at least an ingenious definition to fit the facts of the case; and it seems authorized by the language of the earlier cases.[21] Indeed, an American jurist,[22] has resolved the difficulty in much the same way, saying, "The easements which he (the grantee) sees on the tenement that he buys, must be held to be apparent." There is this flaw in both definitions: that the existence of the easement is made to depend on something visible on the dominant tenement, rather than on the servient; and in the American case, it is said in so many words that the easement is on the dominant tenement. Of course, these are technical objections; but they go to show the difficulties facing a court in determining the meaning of "apparent." These objections are obviated by following a definition which makes the terms "continuous" and "apparent" practically synonymous. "All continuous or apparent easements—in other words, all easements necessary to the reasonable enjoyment of the premises granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted—will pass to the grantee under the grant."[23] It is to be noted that practically, and

[16] Carbrey v. Willis, 7 Allen 364 (Mass. 1863); Sellers v. Texas C. R. Co., 81 Tex. 458 (1891); Scott v. Beutel, 23 Grattan 1 (Va. 1873).

[17] Seymour v. Lewis, 13 N. J. Eq. 439 (1861); Kelly v. Dunning, 43 *id.* 62 (1887); and the principal case.

[18] Gale, Easements, 9th Ed., p. 114; Tiffany, Real Property, Sec. 317.

[19] 1 H. & Norm. 916 (Eng. 1857). For an interesting discussion of the authority of this case cf. Washburn, Easements, p. 72, *et seq.* In Suffield v. Brown, 10 Jur., N. S., 111 (Eng. 1864), the court went out of its way to attack the decision in Pyer v. Carter; but in Ewart v. Cochrane, *supra*, it was expressly approved.

[20] 41 Law Times 327 (1879).

[21] Pyer v. Carter, *supra*, and Wheeldon v. Burrows, *supra*.

[22] V. C. Pitney in Larsen v. Peterson, 53 N. J. Eq. 88 (1894), at p. 93; cf. also Jones, Easements, Sec. 149.

[23] Boone, Real Property, Vol. I, Sec. 140. This definition is practically a quotation from Lord Justice Thesiger in Wheeldon v. Burrows, *supra*.

taking the words in their literal sense, this definition could include the so-called "non-continuous" easements, whenever the latter were "necessary to the reasonable enjoyment of the premises." Aside from that, however, its principal advantage would appear to be the emphasizing of "continuous" rather than "apparent," thereby avoiding difficulties which occur in connection with the latter.

R. T. B.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING IN THE COURSE OF THE EMPLOYMENT—The various terms which have been used in compensation acts to delimit the precise scope of a workman's employment have proved fruitful sources of litigation. A large number of the cases decided under the English Act seek to define the phrase, "personal injury by accident arising out of or in the course of his employment," almost every word of which has been under repeated fire in the courts. Nor do most of the American statutes seem to have clarified the law on this point.[1]

In a very recent case [2] a plumber's assistant was found dead on the road near his employer's wagon, with which he had started to work. The head and shoulders of the deceased were covered with cuts and bruises; death had been caused by a hemorrhage of the brain. Upon these facts the Committee of Arbitration found that the deceased had met his death in the course of his employment.[3] The decision was affirmed by the Industrial Board,[4] only to be reversed by the Supreme Court.[5]

[1] Western Indemnity Co. v. Pillsbury, 151 P. 398 (Cal. 1915); Spooner v. Saturday Night Co., 153 N. W. 657 (Mich. 1915); Klavinsky v. Lake Shore and M. S. Ry. Co., 152 N. W. 213 (Mich. 1915); Rongo v. Waddington & Sons, 87 N. J. L. 395 (1915); Smith v. Price, 153 N. Y. S. 221, 168 App. Div. 421 (1915); Moore v. Lehigh Valley Ry. Co., 154 N. Y. S. 620, 169 App. Div. 177 (1915).

[2] *In re* Sanderson's Case, 113 N. E. 355 (Mass. 1916).

[3] "The Committee further found: 'That there was no direct evidence tending to show how or in what manner Sanderson fell from the wagon. There was no positive evidence as to whether the hemorrhage did occur before or after the fall from the wagon, but from the circumstances as disclosed by all the evidence, we find as a fact that Sanderson either fell or was thrown from his wagon while he was in the employ of Black . . . and that the black and blue spots were made by the fall.' . . ." *In re* Sanderson's Case, *supra.*

[4] "The weight of all the evidence showed that he was thrown by an accident and not by a stroke of apoplexy or other natural causes; and that he was thrown from the wagon by the sudden moving or starting of the horse. . . ." *In re* Sanderson's Case, *supra.*

[5] "While there was ample evidence from which it could have been found that so far as could be ascertained, the employee was in a normal and healthy condition, without any impairment of his arteries or disease of any